DATE: April 7, 1993
CASE NO. 88-ERA-15

IN THE MATTER OF

ANDREW BARTLIK,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

The Secretary remanded this case to the Administrative Law Judge (ALJ) on December 6, 1991 "for submission of a revised recommended decision specifically addressing [certain] questions and supporting his inferences and conclusions with explicit references to the record." *Bartlik v. Tennessee Valley Auth.*, Case No. 88-ERA-15, Remand Order at 17. The ALJ had submitted a Recommended Decision and Order finding that Respondent discriminated against Complainant by failing to approve extensions of his contract, or to provide for him to be employed by engineering firms holding contracts with Respondent, because he had raised safety and quality questions about Respondent's Sequoyah nuclear power plant. The Secretary directed the ALJ to "make specific credibility findings on the testimony of the witnesses or describe the weight given to particular testimony and exhibits which support the ALJ's inferences and conclusions, compared to other parts of the record." Remand Order at 5.

In particular, the Secretary held that the ALJ's conclusion that responsible managers knew who Complainant was or that he had engaged in protected activity, was not sufficiently supported by a discussion of the record. *Id.* at 9; 11. In addition, inferences of discriminatory motive drawn by the ALJ were not

supported by a discussion of those portions of the record tending to prove a finding of discrimination. *Id.* at 12; 13; 14;

16-17. The ALJ also did not address material in the record lending support to Respondent's articulated legitimate reason for failing to extend Complainant's services. *Id.* at 14-16.

In his Revised Recommended Decision (R.R.D.), the ALJ concluded that "one or more upper level managers deliberately prevented a renewal of [Complainant's] contract" in retaliation for his protected activities. *Id.* at 45. But the ALJ interpreted the Secretary's Remand Order to require direct evidence, a "smoking gun," proving that Respondent's managers with authority to approve extensions of Complainant's contract, knew who he was and were aware of his protected activity. *Id.* at 41; 45. Without such proof, the ALJ concluded that Complainant did not carry his burden of proof on this element of his retaliatory discharge claim, and recommended that the complaint be dismissed.

I agree with the ALJ, for different reasons, that the complaint in this case should be dismissed because Complainant did not carry his burden of proof. However, a complainant can prove knowledge of protected activity by either direct or circumstancial evidence. To establish a prima facie case of discrimination under the ERA, Complainant must show that he engaged in protected activity of which Respondent was aware, that Respondent took some adverse action against him, and he must produce evidence sufficient to raise an inference that the protected activity was the likely motive for the adverse action. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Dec. Apr. 25, 1983, slip op. at 7-8. If Complainant establishes a prima facie case, Respondent has the burden of producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. *Id.* at 8. Complainant always bears the burden of proving by a preponderance of the evidence that retaliation was a motivating factor in Respondent's action, and may carry that burden by showing that Respondent's articulated reason was pretextual or that it is more likely than not that discrimination motivated Respondent's action. *Id; House v. Tennessee Valley Auth.*, Case No. 91-ERA-42, Sec. Dec. Jan. 13, 1993, slip op. at 4.

Complainant may carry his burden of proof on any element of a discrimination claim by direct or circumstantial evidence. "The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence . . . ." *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980). There is nothing in the Remand Order requiring direct proof of any element of an ERA claim. [1] Indeed, the order and allocation of burdens of proof and burdens of

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production in *Dartey v. Zack Co.* are applicable only where circumstantial evidence of discrimination is presented. If direct evidence of discrimination exists, and it is not effectively rebutted, a respondent can avoid liability only by showing it would have taken the same action in the absence of protected activity. *Blake v. Hatfield Elec. Co.*, Case No. 87-ERA-4, Sec. Dec. Jan. 22, 1992, slip op. at 5-6.

However, the ALJ based his conviction that "one or more

upper level managers deliberately prevented a renewal of [Complainant's] contract [in violation of the ERA]," R. R. D. at 45, on many speculative assumptions or illogical, unsupported inferences. He reached many of his credibility findings through an analysis of the logic of the testimony and its consistency with other evidence which, for the reasons discussed below, the record does not support. [2] When all these are stripped away, I find that Complainant has not carried his burden of proving by a preponderance of the evidence that Respondent refused to extend his contract because he engaged in protected activities.

The ALJ held that Mr. Hosmer, Sequoyah nuclear plant project engineer, "obviously would be concerned about any engineer who created obstacles to restart [of the plant]," R. R. D. at 19, and "it is reasonable to assume that he could have been interested in knowing the names of engineers like [Complainant] who repeatedly initiated safety concerns." *Id.* at 20. The ALJ did not cite any evidence or testimony to support these assumptions, such as statements by Mr. Hosmer's managers or members of his CAQR review team [3] that Mr. Hosmer asked the names of employees who made safety complaints. In particular, there is nothing in the record showing that Mr. Hosmer asked who Complainant was or whether he had initiated any safety complaints.

When Mr. Hosmer took over as Sequoyah Project Engineer in June or July of 1987, he was briefed by Doug Wilson, the outgoing project engineer, on restart issues. T. 506; 536. The ALJ implied that Mr. Wilson mentioned Complainant's name when Mr. Wilson briefed Mr. Hosmer because Mr. Wilson had had several disagreements with Complainant. Although Mr. Hosmer testified he was briefed "only in the broadest way," T. 536, the ALJ gave little weight to this testimony because of "contradictions" in Mr. Hosmer's testimony on what and when he knew about problems with Appendix R. [4] R. R. D. at 21-22. Mr. Wilson did not testify at the hearing.

For example, the ALJ held that Mr. Hosmer testified a December 8, 1987 meeting with representatives of the Nuclear Regulatory Commission (NRC) did not involve Appendix R, but other evidence contradicted Mr. Hosmer's statement. *Id.* The transcript reference cited by the ALJ as Mr. Hosmer's testimony

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on the NRC meeting does not discuss the meeting at all. Rather, Mr. Hosmer was responding to questions about whether he knew that Ed Sheehy was the author of Revision 7 of the functional requirements for compliance with Appendix R, and what the import was of Revision 7. T. 582-83.

The ALJ also found that a November 30, 1987 memorandum from Mr. Hosmer to Mr. Sheehy and Mr. Renfroe conflicts with Mr. Hosmer's assertion that the NRC meeting did not involve Appendix R issues. R. R. D. at 21. The ALJ did not identify the exhibit number of that document, but from the context it appears to be Complainant's Exhibit (C)-26, which is a November 30, 1987 memo from Mr. Renfroe to Mr. Sheehy, T. 405, not a memo from Mr. Hosmer to Renfroe and Sheehy. The memo does not mention the NRC meeting (which took place over a week later on December 8, 1987.) Mr. Hosmer testified he did not know what the memo, C-26,

was and could only assume the initials "JVH" in the body of the memo were his. T. 586. Mr. Renfroe, the author of the document, also did not testify.

In addition, the ALJ found Mr. Hosmer's testimony contradicted on whether the NRC mentioned any Appendix R problems during a meeting on December 8, 1987, by a memorandum summarizing that meeting. R. R. D. at 21-22; C-40. I do not find a contradiction between this testimony and that memorandum. Mr. Hosmer denied the NRC told him that Respondent did not meet "licensing requirements in the Appendix R area," T. 576, but he did not deny that he discussed Appendix R with the NRC that day, *see* T. 607-608, or that one result of the meeting was a commitment by Respondent to submit "revision 8 of the Appendix R calculations." T. 577; 608; C-40.

Complainant had disagreements with several other engineers about Respondent's compliance with Appendix R and the ALJ placed great weight on those incidents, finding that "it is reasonable to believe that word of these disputes could have reached Hosmer," R. R. D. at 23, and "it seems likely that Hosmer had discussions concerning [Complainant]." *Id.* at 24. For example, Mr. Sheehy testified that Dave Boyll, the Sequoyah site lead engineer for fire protection, objected to including Complainant in a task force to review the Appendix R issues raised in Mr. Daniels' August 28 memorandum to Mr. Hosmer. Mr. Boyll said of Complainant "Andy's a good man but he finds more problems than he solves." T. 395. [5] The ALJ speculated that "Boyll apparently would have been in a position to advise Hosmer on the composition of the task force," T. 23, implying Mr. Boyll advised Mr. Hosmer against including Complainant because he "finds more problems than he solves," i.e., he is a whistleblower. Mr. Boyll did not testify and there is nothing in the record to show that

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Mr. Hosmer ever met with Mr. Boyll to discuss Appendix R, revision 7, the composition of the task force, or any other evidence to support this inference.

Similarly, the ALJ noted that Frank Tanner, an Electrical Engineering Branch Chief, "stormed out of the [October 19] meeting because he felt the issues being raised [about Appendix R and revision 7] would impact the restart schedule." R. R. D. at 16. There is nothing in the record to show that Mr. Hosmer ever discussed Appendix R or Complainant with Mr. Tanner. The ALJ noted that John Henry Sullivan, head of the Sequoyah Power Operations Review Staff, "was Hosmer's technical expert at Sequoyah on Appendix R, knew [Complainant] and had disagreed with him on the assessment of the need for rapid coolant system letdown." R. R. D. at 22. Mr. Sullivan did not testify and there is nothing in the record to indicate he singled out Complainant to Mr. Hosmer for raising Appendix R issues. [6]

The ALJ recognized that Complainant's name did not appear on the August 28 memorandum from Mr. Daniels to Mr. Hosmer. But because the ALJ believed Mr. Daniels thought Complainant was the author, the ALJ speculated that Mr. Daniels "most likely would have discussed the origin of such a potentially significant document [with Mr. Hosmer]." *Id.* at 23. There is nothing else in the record to support such an inference, and I find that

even if Mr. Daniels thought Complainant was the author, this fact would not justify making such an inference. Indeed, Jimmy Pierce, the Knoxville Central Staff engineering specialist responsible for Respondent's Appendix R program at all its nuclear plants, T. 1040, who was Complainant's immediate supervisor, T. 1050, testified that *he* was the author of the August 28 memorandum. T. 1051-52; 1053.

I agree with the ALJ that "[t]here is . . . evidence that Mr. Hosmer knew about many . . . of the problems [Complainant] raised," R. R. D. at 24, but there is little evidence Mr. Hosmer knew it was Complainant who had raised them. Once again, the ALJ speculated that responsibility for signing off on final dispositions of CAQRs "rested" with Mr. Hosmer, even though, as the ALJ acknowledged, "there was no evidence presented" as to who had final sign-off authority. *Id.* at 24.

The ALJ inferred discrimination from what he found was Respondent's regular practice of arranging for "staff augmentee" engineers to be hired by "managed task" contractors. [7] For example, the ALJ found that "[i]t was common practice for TVA managers to recommend specific individuals to contractors." He based this finding on Complainant's testimony that he had seen Respondent recommend a specific person to a contractor, and that Respondent had arranged for Complainant to be hired by another contractor when the contractor he had been working for until May

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1987 lost its contract. R. R. D. at 25. This is hardly sufficient to justify a finding that recommending specific individuals was Respondent's "common practice," [8] or to infer that because Respondent made such arrangements in a few cases, failure to do so a second time for Complainant proves Respondent discriminated against him.

The ALJ found Respondent's reasons for the failure to extend Complainant's contract pretextual because "there was no . . . reduction in number of engineers needed [after the changeover from staff augmentee contracts to managed task contracts], [so] under normal circumstances [Complainant's] employment should have continued." R. R. D. at 35. I find this conclusion completely illogical and I reject it. [9] There is no reason to assume that because the total number of engineers working on the Sequoyah plant remained the same, or even increased, during the changeover that "'most, if not virtually all of the . . . engineers employed under the staff augmentee program would continue employment under the new contracting arrangement.'" *Id.*

Robert Bryans, Project Manager for United Engineers and Constructors, Inc. (UE&C) of a managed task contract with Respondent, T. 795; 798, gave the only specific testimony about the fate of former staff augmentee engineers as a group during the contract changeover. Mr. Bryans testified that UE&C had a staff augmentee contract with Respondent and when UE&C was awarded a managed task contract, about 80 per cent of UE&C's own staff augmentee engineers were "rolled over" to the managed task contract. T. 840. In addition, UE&C transferred its own employees from other offices and took on some new hires, a few of whom might have been former staff augmentees with other companies. T. 842. Assuming UE&C's experience could be

extrapolated to other contractors, it would not support the ALJ's conclusion that under normal circumstances Complainant's employment would have continued, because most of a managed task contractor's employees were its own former staff augmentees, not former staff augmentees for other companies.

The ALJ recognized that UE&C's "experience . . . is not necessarily representative of other firms." R. R. D. at 37. He concluded that "firms needing to hire engineers on a fast track basis would naturally pick local engineers who had been performing the job," because "the record is devoid of evidence to the contrary." *Id.* at 38. This reasoning turns the evidentiary burdens completely upside down. Complainant had the burden of proving he would have been hired by a managed task contractor and that Respondent's discriminatory acts prevented him from being hired. Respondent did not have the burden of proving how many former staff augmentee engineers were hired or not hired by managed task contractors, or of disproving the theory that

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[PAGE 7]

engineering firms would naturally pick local engineers who had worked on the project.

The ALJ also misinterpreted Charles Fox' testimony on how many staff augmentees continued under managed task contracts. R. R. D. at 36. Dr. Fox, who was Respondent's Deputy Manager of Nucler Power, did not admit that many of the staff augmentees were "rolled off" into managed task contracts; he testified "[t]hat may be so, but I'm not the expert in that area." T. 683. The fact that Respondent hired two national experts on Appendix R to review Respondent's compliance with that NRC requirement, T. 675-679, and on a few other occasions may have arranged for specific individuals to be hired, T. 605, does not justify an inference that Respondent did this in almost all cases so that its failure to do so for Complainant constituted discrimination.

None of this evidence shows that an engineer such as Complainant, who worked under a staff augmentee contract for a company that did not obtain a managed task contract, would "under normal circumstances" be hired by a managed task contractor. Even if Complainant had been working for UE&C when it "rolled over" 80% of its engineers to managed task contracts, and "many" staff augmentees of other contractors were "rolled over" to managed task contracts, that would not prove Complainant's employment would have continued. This is not an Executive Order No. 11,246 disparate impact case in which discrimination can be inferred from statistics.

Respondent contracted for some work to be done on Appendix R matters in February and March 1988, and the ALJ speculated that this work could actually have been performed between December 1987 and March 1988 because "there was evidence that TVA at times formally approved contracts after the . . . work had been completed." R. R. D. at 27. The ALJ implies that Complainant would have been contracted for to do this work absent discrimination.

There is nothing in Mr. Hosmer's testimony or the exhibits cited by the ALJ here to support these conclusions, *see* T. 591-98; C-27, 36, 37, nor was there any evidence that the "outside engineers" contracted with to do Appendix R work

performed the same work Complainant was qualified to and would have performed. When he was asked about a contract with UE&C entered into in March 1988, Mr. Hosmer did not say the contract covered work already performed between December and March. Rather, he said the contract was to review documents, called Engineering Change Notices, *written* between December and March. T. 596.

The ALJ implied that Respondent refused to arrange for Complainant to be hired by contractors to work on Appendix R issues and shortly thereafter contracted with outside engineers to do the work Complainant would have done. But Complainant had

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[PAGE 8]
the burden of proving these portions of his case as part of his overall burden of proof of discrimination by a preponderance of the evidence, and the ALJ improperly placed the burden on Respondent to explain the nature of the Appendix R work that was contracted out after Complainant left. R. R. D. at 26-27. Moreover, the ALJ refused to accept Mr. Pierce's explanation that work proposed for Complainant in a managed task package eventually was performed by Respondent's employees, not outside contractors, even though no one contradicted Mr. Pierce's testimony. R. R. D. at 27; T. 1071. Mr. Pierce and Mr. Fox testified that several other individuals contracted with to work on Appendix R issues after Complainant left did not do the work Complainant had been doing. T. 1072-1078; 672; 675-79.

The ALJ discussed at length a disagreement in the testimony between Complainant and George P. Cooper [10] over the amount of work remaining to be done in November 1987 on a safety issue raised by Complainant, "instrument sense line integrity." R. R. D. at 28-30. If there was a significant amount of work remaining to be done on the problem, it could imply Respondent's explanation for failing to extend Complainant's contract to work on it was pretextual. Complainant recalled that there was "a significant quantity of work remaining" on this issue, T. 134, but Mr. Cooper testified that the work would have taken only one or two weeks. T. 1005. The ALJ gave greater weight to Complainant's testimony, R. R. D. at 30, although Mr. Pierce, Complainant's immediate supervisor, corroborated Mr. Cooper's testimony on the point. T. 1082. In any event, even if there was a "significant" amount of work rather than a few weeks' work to be done on the issue (Complainant was never asked what he meant by "significant"), I do not accept the implicit inference that this proves Respondent's decision to do the work in-house was pretextual.

Douglas Michlink was Assistant Project Engineer of the Sequoyah plant and was one of three top managers with authority to approve engineering contracts, T. 717-18, but the ALJ dismissed him as "a functionary who was not involved in an analysis of the work, but merely checked to see if the type of contract met certain criteria." R. R. D. at 30. To the contrary, Mr. Michlink's role in extensions of staff augmentee contracts appears to have been that of a manager making an engineering management judgment about the need for an engineer's services. Mr. Michlink testified that when he received a request for an extension of a staff augmentee, he determined whether the engineer was "involved in anything critical for the restart of

[the Sequoyah plant][.] . . . I would consult with the Lead Engineer [in] the discipline [making the request] [and] verify

what [the staff augmentee was] involved with, and . . . consult

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[PAGE 9]
with the Project Engineer." T. 723. [11]

The ALJ apparently found Mr. Michlink's testimony unreliable because he said he never approved any staff augmentee contracts after 1987, but the record showed one he had approved in July 1988, and "Counsel represented that there were other such contracts." R. R. D. at 30. It was improper for the ALJ to rely on counsel's representations rather than evidence in the record, and one such contract entered into eight months after Complainant's last day at TVA does not impeach all Mr. Michlink's testimony. The ALJ found Mr. Michlink evasive, but the exchange with Complainant's counsel he referred to appears to be no more than a misunderstanding about Respondent's budget and expenditure terminology. T. 845-58. None of this supports an inference that "[Mr.] Hosmer [and Mr.] Michlink knew [that Complainant was] the beneficiary of" a request for a contract extension submitted on Nov. 2, 1987, R. R. D. at 31, if the ALJ's statement implies Mr. Hosmer and Mr. Michlink knew who Complainant was (beyond seeing his name on the paperwork) and that he had engaged in protected activity.

A "managed task package" for Complainant's employment by one of the managed task contractors was submitted to Mr. Michlink around Nov. 18, 1987. R. R. D. at 26. Mr. Michlink sent the package to Mr. Daniels with a note listing additional information required "before it can go out." C-17. After Mr. Daniels asked William Estes, an engineer who worked for Mr. Daniels, whether the package was for Complainant and learned it was, Deposition of Mr. Daniels, C-56, pp. 18, 20, 26-27, the package was not processed further. R. R. D. at 26. The ALJ inferred that "the next approval authority would have been Mr. Hosmer," *id.*, implying that Mr. Hosmer discriminatorily refused to process the package. But there was no evidence Mr. Hosmer ever saw that package. Mr. Michlink testified he never got a reply from Mr. Daniels about the task package, T. 743, and Mr. Daniels said in his deposition that to his knowledge he never reported to Mr. Hosmer on the status of this package. C-56, p. 37.

Charles Fox was one of two Deputy Managers of Nuclear Power for Respondent in 1987, with responsibility for ensuring that Respondent received high "productivity" from its engineering contractors, T. 626-27, and authority to approve all requests for extensions of staff augmentee contracts. T. 658. The ALJ's findings on Dr. Fox' testimony are enigmatic. On one hand, the ALJ commented that Dr. Fox "could well have not known about [Complainant] until after [Complainant's] departure," R. R. D. at 32, but he also speculated "it seems highly unlikely [Fox and Michlink] would have disapproved [requests to extend Complainant's contract] without at least some discussion with the managers who were more directly involved in the work." *Id.* at

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[PAGE 10]
33. The ALJ's discussion of the rejection of a proposal for Complainant to work on the Bellefonte plant, and the pagination of Rebecca Hansen's notebook, [12] add little toward a resolution of the issue of discrimination. The ALJ's comment

that "[i]f Ms. Hansen had heard of the Bartlik situation before December 15th [1987], it is likely that she would have reported this information to Dr. Fox[,] [and] [i]nformation about a troublemaker obviously might have prompted him to disapprove the proposal," R. R. D. at 34, is the most rank speculation.

Only one part of the record might justify an inference that Mr. Hosmer knew who Complainant was and discriminatorily refused to approve a contract extension for him. Mr. Sheehy testified that on the evening of Dec. 7, 1987, he and several others met with Mr. Hosmer to prepare him for a meeting with the NRC the next day, and to explain Respondent's problems with Appendix R at Sequoyah. T. 405-406. Mr. Sheehy and the others recommended setting up a task force to review Respondent's compliance with Appendix R, and when Mr. Sheehy recommended assigning Complainant to the task force, Mr. Hosmer said "I don't want contractors working on problems they discovered." Mr. Sheehy testified he had the impression Mr. Hosmer knew who Complainant was, and Mr. Hosmer approved all the other recommended task force members. T. 409.

I cannot find, however, that this testimony is sufficient to prove by a preponderance of the evidence that Respondent discriminated against Complainant. The ALJ's suppositions and speculations, for the reasons discussed above, do not aid Complainant, and I find he has not carried his burden of proof. Accordingly, the complaint in this case is DISMISSED.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Although it is not necessary for me to address each of Complainant's arguments in his briefs before me where they go beyond the ALJ's R. R. D., I note that I do not agree with Complainant's theory of constructive knowledge of the protected activity by the alleged discriminating official. Although knowledge of the protected activity can be shown by circumstantial evidence, that evidence must show that an employee of Respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge of the protected activity. Neither *Atchison v. Brown & Root, Inc.*, Case No. 82-ERA-9, Sec. Dec. Jun. 10, 1983, nor *Frazier v. Merit Systems Protection Bd.*, 672 F.2d 150 (D.C. Cir. 1982), relied on by Complainant, hold that knowledge can be imputed to a deciding official who has not

delegated decision making authority or is not simply adopting the recommendation of a subordinate who did have knowledge. Those cases hold that, in contrast to the facts here, where managerial or supervisory authority is delegated, the official with ultimate responsibility who merely ratifies his subordinates' decisions cannot insulate a respondent from liability by claiming "bureaucratic 'ignorance'." 672 F.2d at 166.

[2] Substantial weight should be given to credibility findings that "rest explicitly on an evaluation of the demeanor of the witnesses," *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983), but credibility findings based on internal inconsistency, inherent improbability, important discrepancies, impeachment or witness self-interest are entitled to the weight which "in reason and in the light of judicial experience they deserve." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951); *Ertel v. Giroux Brothers Transp., Inc.*, Case No. 88-STA-24, Sec. Dec. Feb. 16, 1989, slip op. at 12 and n.7.

[3] A "Condition Adverse to Quality Report," CAQR, is used by Respondent "to document any serious deficiencies in [its] nuclear program that can impact safety." T. 44. Mr. Hosmer established "a four man group . . . that did nothing but track restart CAQRs [those that could affect restart of the Sequoyah plant]." T. 606.

[4] Appendix R is an appendix to the Nuclear Regulatory Commission (NRC) regulations on the construction and operation of nuclear power plants, 10 C.F.R. Part 50 (1992) dealing with fire protection.

[5] I find that the ALJ misinterpreted Mr. Sheehy's testimony about the September 1987 meeting to discuss the Appendix R Review Team. Contrary to the ALJ's finding, Mr. Hosmer did not attend that meeting. T. 393. I also find that the ALJ misinterpreted the testimony about the meeting at which Dave Boyll criticized Complainant as someone who "finds more problems than he solves." Mr. Boyll made this comment at the September 1987 meeting, which Complainant did not attend, not at the October 19, 1987 meeting, which Complainant did attend. *See* T. 49; 52; 58; 393-95; 397. The ALJ also incorrectly attributed this statement to Mr. Boyll at both the September and October meetings. *See* R. R. D. at 14-15.

[6] I note that at least two other engineers, Mr. Sheehy and Mr. Daniels, played more of a lead role in raising Appendix R issues than Complainant (Mr. Sheehy was the author of Revision 7 and Mr. Daniels signed the August 28 memorandum to Mr. Hosmer), but there has been no suggestion in this record that any action was taken against either for this activity.

[7] See Remand Order at pp. 2 and 3 for a description of staff augmentee and managed task contracts.

[8] I note that when Respondent "made arrangements for

[Complainant] to move over to another company" in May 1987, he had already raised many of the safety complaints which he continued to pursue through the summer and fall of 1987. For example, Complainant told Mr. Sullivan in March or April 1987 about the Appendix R problems Complainant had uncovered in February, and Mr. Sullivan disagreed and said Complainant did not know what he was talking about. T. 32. Complainant raised questions about the "power operated relief valve" (PORV) in January or February 1987, T. 65, many engineers knew about the problem he raised, T. 67, and Mr. Edlund of the Nuclear Engineering Branch did not agree it was a problem before Complainant submitted his design changes to Mr. Daniels in April. T. 68. In a conference call on the PORV issue in May 1987, Mr. Wilson cut Complainant off and said Complainant did not know what he was talking about. T. 71-72. Complainant also raised the "letdown" issue with Mr. Sullivan in May 1987, T. 91, but Mr. Sullivan disagreed and seemed annoyed with Complainant for raising the issue. T. 94.

[9] With no basis in the evidence, the ALJ commented in a footnote that "[n]o doubt the avoidance of personnel problems was also a major consideration" in the changeover from staff augmentee to managed task contracts. R. R. D. at 35 n.17. For that reason, I reject this finding and the implication that Respondent used the changeover process to rid itself of troublesome employees.

[10] Mr. Cooper described his position as the "Functional Area Manager in the Mechanical Engineering discipline over the HVAC Fire Protection and Service Systems area of the Mechanical discipline in the Nuclear Engineering part of Nuclear Power." T. 993. He managed about 150 technical workers, including Complainant.

[11] This was the only description of Mr. Michlink's role in the five pages of testimony cited by the ALJ.

[12] Ms. Hansen was a staff assistant to Admiral White, the Manager of Nuclear Power, and worked on special projects for Dr. Fox. T. 894-95.